

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 ALLEN H. NOEL,)

8 Plaintiff,)

9 v.)

10 CITY OF SEATTLE, et al.,)

11 Defendants.)

CASE NO. C05-1367-MJB

MEMORANDUM OPINION
AND ORDER

12
13 I. INTRODUCTION AND SUMMARY CONCLUSION

14 This matter is before the undersigned Magistrate Judge by consent of the parties.
15 On August 5, 2005, plaintiff Allen H. Noel ("Mr. Noel"), proceeding *pro se*, filed a
16 complaint against the City of Seattle ("City") and the State of Washington ("State"),
17 alleging violation of Title II of the Americans with Disabilities Act of 1990 (ADA). Dkt.
18 #1. This lawsuit currently proceeds solely against the State, as Mr. Noel previously
19 stipulated to dismissal of his claims against the City. *See* Dkt. #10.

20 Now before the Court is the State's motion for dismissal and/or summary
21 judgment, seeking dismissal of Mr. Noel's lawsuit with prejudice pursuant to Fed. R.
22 Civ. P. 12(c) or in the alternative Fed. R. Civ. P. 56(c). Mr. Noel filed a response in
23 opposition to the motion (Dkt. #21) and the State filed a reply (Dkt. #22). Having
24 reviewed the State's motion, all pleadings in support and in opposition thereto, and the

25 MEMORANDUM OPINION
26 AND ORDER - 1

1 remaining record, the Court GRANTS the State's motion and dismisses all Mr. Noel's
2 claims against the State.

3 II. BACKGROUND

4 Pursuant to the mandate set forth in RCW 77.04.012, the Washington State
5 Department of Fish and Wildlife ("WDFW") manages numerous parcels of land
6 throughout the state for various purposes, including preserving habitat and providing
7 hunting and other recreational opportunities to the public. *See* Dkt. #19, Attachment 1 -
8 Decl. of Brian W. Williams. This case arises out of a proposal developed by the
9 WDFW, in partnership with the Skagit River Systems Cooperative, the Skagit Watershed
10 Council, and Seattle City Light, to restore 157 acres of the Headquarters Unit of the
11 Skagit Wildlife Area ("Headquarters Unit") to estuarine habitat. The proposal, which is
12 described in a document entitled the Wiley Slough Estuarine Restoration Design, dated
13 July 2005 ("Design Document"), is referred to as the Wiley Slough Project¹. Dkt. #19 at
14 4.

15 WDFW acquired the Skagit Wildlife Area in the 1950's. Dkt. #19, Attachment 1
16 at 2. A portion of the property is commonly referred to as the "Headquarters Unit," the
17 majority of which was originally tidal marsh habitat. *Id.* Upon acquisition of the
18 property, WDFW began managing it for the benefit of waterfowl by converting a portion
19 of the property to tillable soil in which cereal grains could be grown in order to attract
20 and provide winter forage for waterfowl. *Id.* The conversion required construction of a
21 perimeter dike to protect the site from riverine and tidal inundation, and installation of
22 tide gates to allow water from the site to sufficiently drain to Skagit Bay, to prevent

23
24 ¹The Wiley Slough Area is located on Fir Island in the Skagit River delta near Conway,
25 WA. Dkt. #19, Ex. A at 5.

1 water from the Skagit River and Skagit Bay from flooding the site, and to allow the site
2 to be planted with cereal grains. Since the conversion, the land has been used by
3 members of the public for waterfowl and pheasant hunting, bird-watching, walking, and
4 other recreational activities. *Id.*

5 The exclusion of the site from tidal and riverine influence eliminated the tidal
6 marsh habitats that provide important rearing habitats for juvenile salmon. Dkt. #19,
7 Attachment 1 at 3. The area in which the Skagit Wildlife Area is located provides
8 critical rearing habitat for Puget Sound Chinook Salmon and Bull Trout, which are listed
9 as threatened under the federal Endangered Species Act (“ESA”), and for Puget Sound
10 Steelhead, which is proposed for listing under the ESA. *Id.* The Wiley Slough Project
11 will provide estuary habitats beneficial to both fish and wildlife species. *Id.*

12 Mr. Noel states that he is a disabled recreational hunter and birdwatcher, who
13 regularly uses the Fir Island portion of the Skagit Wildlife Area. Dkt. #1 at 2. He
14 indicates that he suffers from serious mobility disabilities, and that the Headquarters
15 Unit is the only WDFW area where he can traffic on the fields successfully to hunt
16 pheasant. Dkt. #21 at 1. He contends that the proposed Wiley Slough Project would
17 eliminate most of the dikes, and hence the fields between them that allow for pheasant
18 hunting. Dkt. #21 at 1. He further contends that the WDFW plans to stop its present
19 pheasant release program as a part of the Wiley Slough Project. *Id.* He claims that the
20 WDFW developed the plan without properly notifying the hunting public, the Wiley
21 Slough Project contains no accommodation for the disabled hunter, and the disabled
22 were never considered in the development of the plan. *Id.* at 2.

23 The State indicates that the Wiley Slough Project would involve removal of the
24 dikes around the perimeter of the Headquarters Unit, augmentation of an existing dike
25

1 that runs through the parcel, and construction of an additional dike adjacent to private
2 farm land that borders the parcel. Dkt. #19 at 4. The State asserts that in those areas
3 proposed in the Design Document for public access, including the parking lot and the
4 dike running through the middle of the site, WDFW plans to provide ADA compliant
5 access for the disabled. *Id.* The State also indicates that WDFW and its partners
6 conducted public outreach efforts in order to inform the affected communities about the
7 restoration project and to receive their input prior to finalizing the Design Document.
8 Specifically, the States asserts that information field trips were held at the site on five
9 different dates during the spring and summer of 2004, and two open houses were held in
10 Skagit County, at which public comments were received. *Id.* at 4-5.

11 III. THE PARTIES POSITIONS

12 In his Complaint, Mr. Noel alleges that defendants engaged in unlawful disability
13 discrimination in violation of Title II of the Americans with Disabilities Act of 1990 by:
14 (1) failing to inform or include plaintiff and other disabled hunting citizens and other
15 disabled recreational users of the area affected by the Wiley Slough Restoration Project
16 in the planning process for the Project; (2) failing to hold public meetings for or
17 distributing any materials to plaintiff or other disabled hunting citizens or other disabled
18 recreational users of the area affected by the Wiley Slough Restoration Project; (3)
19 failing to include adequate funding for accommodation or assistance to plaintiff or other
20 disabled hunting citizens or other disabled recreational users of the area affected by the
21 Wiley Slough Restoration Project; and (4) failing to conduct public meetings which
22 provide for adequate physical accommodations or hearing accommodations for plaintiff
23 or other disabled hunting citizens or other disabled recreational users of the area affected
24 by the Wiley Slough Restoration Project. Dkt. #1 at 4. He seeks injunctive relief,

1 attorney's fees and such other relief as the court deems equitable. *Id.* at 4-5.

2 In the present motion, the State moves for dismissal of Mr. Noel's claims on the
3 basis that (1) Mr. Noel has not established that he has standing to make the claims stated
4 in his complaint or to request injunctive relief, and (2) he has not stated a claim for
5 which relief may be granted under the ADA. Further, if the Court determines that Mr.
6 Noel has standing and has stated a claim under the ADA, the State moves for dismissal
7 of Mr. Noel's claims regarding funding and the accessibility of public meetings on
8 summary judgment.

9 In response to the State's motion, Mr. Noel also claims that the WDFW has
10 produced a plan for the Headquarters Unit which discriminates against him, a disabled
11 hunter, as it will eliminate all pheasant hunting in the Headquarters Unit without
12 providing reasonable alternatives. He requests that the court reject the motion for
13 dismissal and consider non-judicial binding arbitration or trial as fair methods to resolve
14 the conflict.

15 IV. STANDARD OF REVIEW

16 Under Fed. R. Civ. P. 12(c), when the district court has before it a motion for
17 judgment on the pleadings, and matters outside the pleadings have been presented and
18 are not excluded by the court, the court must treat the motion as one for summary
19 judgment and dispose of it as provided in Rule 56. *See* Fed R. Civ. P. 12(c). In deciding
20 the present motion, this Court will consider matters outside of the pleadings, including
21 the declarations and exhibits attached to the State's motion and reply, as well as the
22 attachments to Mr. Noel's response in opposition to the motion. Accordingly, the Court
23 treats the State's motion as a motion for summary judgment pursuant to Rule 56.

24 Summary judgment is appropriate if the "pleadings, depositions, answers to
25

1 interrogatories, and admissions on file, together with the affidavits, if any, show that
2 there are no genuine issues as to any material fact and that the moving party is entitled to
3 judgment as a matter of law.” Fed. R. Civ. P. 56(c). In deciding a summary judgment
4 motion, the court views the evidence in the light most favorable to the non-moving party,
5 and draws all reasonable inferences in that party’s favor. *T. W. Elec. Serv., Inc. v.*
6 *Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630-31 (9th Cir. 1987). The moving
7 party has the burden of demonstrating the absence of genuine issues of material fact.
8 *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S.Ct. 2505, 91 L.ed.2d 202
9 (1986). If the movant meets this burden, then summary judgment will be granted unless
10 there is significant probative evidence tending to support the opponent’s legal theory.
11 *See First Nat’l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968).

12 V. DISCUSSION

13 Title II of the ADA prohibits a public entity² from discriminating against a
14 qualified individual with a disability, or excluding such an individual from participation
15 in, or denying the individual the benefits of, any of the entity’s services, programs, or
16 activities. *See* 42 U.S.C. § 12132. In this case, Mr. Noel generally alleges that
17 defendant violated Title II of the ADA during the planning process for the Wiley Slough
18 Project. The State initially argues that Mr. Noel has not established that he has standing
19 to bring this lawsuit and that he has failed to state a claim under the ADA. Standing is a
20 threshold question in every case. *Alaska Fish and Wildlife Federation and Outdoor*
21 *Council, Inc. v. Dunkle*, 829 F.2d 933, 937 (9th Cir. 1988). Thus, this Court first
22

23 ²The ADA definition of “public entity” includes “any State or local government;
24 and any department, agency, special purpose district, or other instrumentality of a State or
25 States or local government.” 42 U.S.C. § 12131(1).

1 considers whether standing exists in this case.

2 A. Standing

3 “It goes without saying that those who seek to invoke the jurisdiction of the
4 federal courts must satisfy the threshold requirement imposed by Article III of the
5 Constitution by alleging an actual case or controversy.” *Fortyune v. American Multi-*
6 *Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004) (quoting *City of Los Angeles v.*
7 *Lyons*, 461 U.S. 95, 101, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)). To show Article III
8 standing, a plaintiff has the burden of proving: (1) that he has suffered an “injury in
9 fact,” (2) a causal relationship between the injury and the challenged conduct, and (3)
10 that the injury likely will be redressed by a favorable decision. *See Lujan v. Defenders*
11 *of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). In the
12 context of injunctive relief, [the plaintiff] must additionally demonstrate “a sufficient
13 likelihood that he will again be wronged in a similar way[.]” *Fortyune*, 364 F.3d at 1081
14 (quoting *Lyons*, 461 U.S. at 111, 103 S.Ct. 1660)). That is, he must establish a “real and
15 immediate threat of repeated injury.” *Id.* (quoting *O’Shea v. Littleton*, 414 U.S. 488,
16 496, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)).

17 The first element of standing is at issue in this case. The State contends that Mr.
18 Noel has failed to allege an injury in fact. An injury in fact is a harm that is (a) concrete
19 and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Lujan*,
20 504 U.S. at 560, 112 S.Ct. 2130 (internal citations omitted). In *Lujan*, the Court notes
21 that “[b]y particularized, we mean that the injury must affect the plaintiff in a personal
22 and individual way.” *See supra* text accompanying note 1.

23 Specifically, the State argues that Mr. Noel’s allegations in the Complaint fail to
24 describe any concrete, particularized injury to himself resulting from the State’s actions

1 that he claims were inconsistent with the ADA. The State asserts that Mr. Noel's
2 complaint only makes general allegations that WDFW failed to provide adequate public
3 involvement opportunities for himself and other disabled hunters or disabled recreational
4 users of the Headquarters Unit, and that WDFW failed to "include adequate funding for
5 accommodation or assistance to plaintiff or other disabled hunting citizens or other
6 disabled recreational users of the area." Dkt. #19 at 7. Additionally, the State argues that
7 Mr. Noel does not allege any real and immediate threat of *future* injury that might
8 establish standing to request an injunction because his allegations regarding public
9 notice and input opportunities are all in the past tense, and his contention regarding
10 inadequacy of funding for ADA accommodations is necessarily vague because the
11 project partners have only obtained partial funding at this point. *Id.*

12 In response to the State's motion, Mr. Noel argues that due to WDFW's
13 inadequate notification to the public about the project, he was eliminated from any
14 meeting during the project's development. Dkt. #21 at 4-5. He also argues that "there is
15 little doubt WDFW believes it will unquestionably obtain the money [for the project]
16 from one source or another otherwise it would not have pursued the project to its present
17 stage of development" (Dkt. #21 at 5), and that WDFW failed to provide funds for the
18 disabled since they were ignored when the project was developed (Dkt. #21 at 8). Mr.
19 Noel further contends that "immediate damage has been done to [him] since the planned
20 removal of both pheasant hunting areas within a short distance of his new home on
21 Camano Island has caused great fear and anxiety increasing his already serious case of
22 Post-Traumatic Stress Syndrome (PTSD) related to military duty" and "[i]t also has
23 generated apprehension that he will not be able to hunt pheasant in the future." Dkt. #21
24 at 6-7.

1 At the pleading stage, general factual allegations of injury resulting from the
2 defendant's conduct may suffice, for on a motion to dismiss [the court] presum[es] that
3 general allegations embrace those specific facts that are necessary to support the claim."
4 *Lujan v. Defenders of Wildlife*, 504 U.S. at 561, 112 S.Ct. 2130, (quoting *Lujan v.*
5 *National Wildlife Federation*, 497 U.S. 871, 889, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695
6 (1990)). In response to a summary judgment motion, however, the plaintiff can no
7 longer rest on such "mere allegations," but must "set forth " by affidavit or other
8 evidence "specific facts" showing that there is a genuine issue for trial. Fed. R. Civ. P.
9 56(e); *see also*, *Lujan*, 504 U.S at 561, 112 S.Ct. at 2137. A mere scintilla of evidence is
10 insufficient to create a factual dispute. *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505.

11 Here, this Court agrees with the State that Mr. Noel failed to allege specific facts
12 in his Complaint showing that he suffered an injury in fact. The complaint alleges that
13 the Wiley Slough Project will reduce public access and access for disabled recreational
14 users and hunters (Dkt. #1 at 2-3), but it does not identify any "actual or imminent" harm
15 to Mr. Noel as a result of the WDFW's allegedly discriminatory conduct during the
16 planning stages of the project. Thus, the allegations in Mr. Noel's complaint are
17 insufficient to satisfy the first element of the standing requirement.

18 Moreover, the injuries Mr. Noel now alleges in his response to the summary
19 judgment motion—*i.e.*, being denied input during development of the project, and fear
20 and anxiety increasing his PTSD—are not supported by the evidence he produced with his
21 response. Mr. Noel alleges that WDFW's notices announcing the public meetings³ were

22
23 ³In support of its summary judgment motion, the State submitted the sworn declaration of
24 Brian W. Williams, the Area Habitat Biologist who co-chaired the design team that produced the
25 Design Document for the Wiley Slough Project, indicating that the five informational site tours
26 and two open houses regarding the project were advertised on the project website and through

1 “limited in the extreme,” that a very small percentage of all Headquarters Unit hunters
2 might have seen the notices, that the vast majority of hunters do not live in Western
3 Skagit County and most travel from King, Snohomish and Whatcom counties, and that
4 most hunters were first notified of the project by a large sign posted next to the entrance
5 to the Headquarter Unit by a hunting organization opposed to the project. However, he
6 proffers no affidavits or evidence that supports these allegations. In fact, Mr. Noel
7 admits that he had already heard about the project from other hunters by the time an 8-
8 1/2 by 11 inch notice was posted by WDFW in the Headquarters Unit. Dkt. #21 at 4.
9 And, Mr. Noel does not contend that he never saw the notice about the project that was
10 posted by the WDFW at the Headquarters Unit.

11 Mr. Noel has also provided a letter from his clinical psychologist, who states that
12 Mr. Noel has a significant PTSD secondary to combat exposure of military service
13 during the Vietnam war. *See* Dkt. #21, Attachment B. However, neither this letter, nor
14 any of the other evidence that Mr. Noel attached to his response to the summary
15 judgment motion, mention or support his allegations of “fear and anxiety increasing his
16 already serious case of PTSD.” *See* Dkt. #21, Attachments A and B. Likewise, Mr.
17 Noel’s allegations regarding WDFW’s certainty about obtaining funding for the project
18 in no way supports his claim that defendant failed to include adequate funding for
19 accommodation or assistance to plaintiff or other disabled hunting citizens/recreational
20 users of the area in question.

21 In the absence of any supporting affidavits or other evidence, Mr. Noel’s
22

23 _____
24 notices posted at an information kiosk located at the Skagit Wildlife Area. Dkt. #19, Attachment
25 1 at 4-5. The State also submitted copies of the notices for the site tours and open house. *Id.*,
26 Ex. B.

MEMORANDUM OPINION
AND ORDER - 10

1 allegations alone are insufficient to show injury in fact at the summary judgment stage of
2 the litigation. Thus, there are no genuine issues of material fact regarding Mr. Noel's
3 failure to satisfy the injury in fact element of the standing requirement. Accordingly,
4 this Court concludes that Mr. Noel lacks standing to seek relief for the WDFW's alleged
5 violations of the ADA during the planning process for the Wiley Slough Project.

6 B. Ripeness

7 In his response to the State's motion, Mr. Noel includes a claim not raised in his
8 complaint. He claims that the planned Wiley Slough Project discriminates against him, a
9 disabled hunter, because it would eliminate all pheasant hunting at the Headquarters
10 Unit of the Skagit Wildlife Area and there is no reasonable alternative to him as a
11 disabled hunter. Dkt. #21 at 1-2. He asserts that this litigation is ripe and he has
12 standing because once the Wiley Slough Project is completed, it will be irreversible,
13 with no reasonable alternative available. *Id.* at 8.

14 The State responds that these claims are not ripe for review. Specifically, the
15 State argues that Mr. Noel's claim that implementation of the Wiley Slough project will
16 result in his exclusion from bird hunting on WDFW-managed lands altogether is not ripe
17 because: 1) funding and permits for the Wiley Slough Project have yet to be obtained,
18 and therefore it is not clear if and when the project may be constructed; 2) the
19 parameters of the WDFW's hunting program are in flux; and 3) until an indefinite time
20 in the future, the Headquarters Unit will continue to provide the pheasant hunting
21 opportunity that Mr. Noel currently enjoys.

22 The doctrine of ripeness is intended "to prevent the courts, through avoidance of
23 premature adjudication, from entangling themselves in abstract disagreements over
24 administrative policies, and also to protect the agencies from judicial interference until

1 an administrative decision has been formalized and its effects felt in a concrete way by
2 the challenging parties.” *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1381 (9th Cir.
3 1986) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507,
4 1515, 18 L.Ed.2d 681 (1967)). Ripeness requires an evaluation of the “fitness of the
5 issues for judicial decision and the hardship to the parties of withholding court
6 consideration. *Abbott*, 387 U.S. at 149; 87 S.Ct. 1507. A claim is fit for decision if the
7 issues raised are primarily legal and do not require further factual development and the
8 challenged action is final. *Trustees for Alaska*, 806 F.3d at 1381; *see also Duffy v.*
9 *Riveland*, 98 F.3d 447, 452 (9th Cir. 1996). “[A] federal court normally ought not
10 resolve issues ‘involving contingent future events that may not occur as anticipated, or
11 indeed may not occur at all.’” *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir.
12 1996).

13 Here, Mr. Noel’s claim that there would be no reasonable alternative available to
14 him for pheasant hunting on WDFW-managed lands if the Wiley Slough Project is
15 implemented is not ripe adjudication because it requires further factual development.
16 While it is undisputed that the Wiley Slough Project would eliminate pheasant hunting at
17 the Headquarters Unit, the record also contains evidence that WDFW is looking for a
18 suitable site in Skagit County to reestablish upland pheasant hunting. *See* Dkt. #19, Ex.
19 A at 14 and 15 (Wiley Slough Estuarine Restoration Design: Summary Report); *see also*
20 Dkt. #22, Attachment 1 at 3, Decl. of Lora Leschner⁴ (indicating that WDFW is actively
21 searching for opportunities to buy or lease additional land for walk-in hunting,
22 particularly pheasant hunting; WDFW is negotiating on potential new acquisitions in

23
24 ⁴Lora Leschner is the Wildlife and Lands Program Manager for Region 4 of
25 WDFW. Dkt. #22, Attachment 1 at 1.

1 Skagit County that could be improved with disabled access). Lora Leschner also
2 indicates that the nearby pheasant release sites at Snoqualmie, Lake Terrell, ARCO and
3 Intalco offer terrain similar to the Skagit Wildlife headquarters and some disabled people
4 can access those fields. Dkt. #22, Attachment 1 at 2.

5 Mr. Noel acknowledges the existence of other pheasant hunting units, although he
6 alleges that they are “more than an hour away by auto” and “are presently heavily used”
7 which he claims “puts the disabled hunter at a distinct disadvantage.” Dkt. #21 at 3.
8 Yet, even taking these allegations as true, the issue of whether implementation of the
9 Wiley Slough Project would eliminate all reasonable alternatives of pheasant hunting for
10 him as a disabled hunter is clearly bound up in the unknown facts of whether the
11 WDFW will be successful in its efforts to acquire other pheasant hunting sites in the
12 Skagit County area that could be improved with disabled access.

13 Moreover, denying judicial review at this time is not a hardship to any party in
14 that it will not create a direct and immediate dilemma for Mr. Noel and his access to
15 pheasant hunting on the site because actual construction under the Wiley Slough Project
16 will not begin until after funding is secured and the federal and state permits have been
17 obtained. *See* Dkt. #19, Attachment 1 at 4 and Ex. A at 14. Adjudicating this case now,
18 based on what might or might not happen in the future, will result in a disposition that
19 may not be grounded in fact.

20 C. Failure to State a Claim

21 The State also argues that Mr. Noel’s Complaint should be dismissed because he
22 has failed to state a claim on which relief can be granted under the ADA because he has
23 not alleged that he has not alleged that he has been excluded from participation in or
24 denied the benefits of any service, program or activity of the State by reason of a

1 disability from which he suffers. However, in light of the conclusions on standing and
2 ripeness in sections A and B *supra.*, the Court need not reach this issue.

3 V. CONCLUSION AND ORDER

4 For the reasons stated above, the Court finds that this suit is nonjusticiable
5 because Noel failed to show sufficient injury to confer standing, and because his claim
6 that the Wiley Slough Project will eliminate all reasonable alternatives for pheasant
7 hunting for him as a disabled hunter is not yet ripe for adjudication. Therefore, the
8 Court GRANTS the States's motion for summary judgment (Dkt. #19) and dismisses all
9 of Mr. Noel's claims against the State. It is further ORDERED that the pending motion
10 for elimination of court mandated mediation (Dkt. #25) shall be STRICKEN as moot.

11 DATED this 27th day of September, 2006.

12
13 

14 MONICA J. BENTON
15 United States Magistrate Judge
16
17
18
19
20
21
22
23
24
25